IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee, v. First Lieutenant (0-2) **CALYX HARRELL**, USAF Appellant.	BRIEF OF AMICUS CURIAE IN SUPPORT OF APPELLANT USCA Dkt. No. 16-0007/AF Crim. App. No. 38538

BRIEF OF AMICUS CURIAE IN SUPPORT OF APPELLANT

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TO THE HONORABLE, THE JUDGES OF
THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

Issue Presented

WHETHER A CANINE UNIT'S ACTIONS ARE A SEARCH UNDER THE FOURTH AMENDMENT WHEN THE DOG PHYSICALLY TRESPASSES BY PLACING ITS BODY IN OR ON A VEHICLE IN AN EFFORT TO DETECT CONTRABAND.

Statement of Statutory Jurisdiction

Amicus Curiae adopts Appellant's Statement of Statutory Jurisdiction.

Statement of the Case

Amicus Curiae adopts Appellant's Statement of the Case.

Statement of the Facts

Amicus Curiae adopts Appellant's Statement of Facts.

Summary of Argument

The trial court improperly denied Appellant Calyx Harrell's motion to suppress because the officers obtained evidence by physically trespassing on her vehicle.

The trial court made a finding of fact that the dog did not put its nose in the vehicle. This finding was clear error because the judge made it without dispositive testimony from the canine officer and despite contradictory video evidence. Regardless the dog trespassed onto Harrell's vehicle by jumping onto it.

Police may not side-step the Fourth Amendment by using a drug dog, as courts sometimes have assumed. Dog sniffs do not receive a special exemption. When they occur in constitutionally protected areas they are searches.

The officers' use of a police dog constituted a search because they physically trespassed onto Harrell's constitutionally protected effects to gather information. This physical trespass is a search under the Fourth Amendment.

Even if the police action was not a search under the physical-trespass test, it violated Harrell's reasonable expectation of privacy. Rather than a sniff around the car, which is not a search under a limited Fourth Amendment exception, here the dog physically intruded on the vehicle. This is a search even if the dog was instinctively following the scent of drugs into the trespass.

Argument

This is a case of a straight forward Fourth Amendment violation. The police physically trespassed on Harrell's private property to obtain information. They did so by allowing a dog to jump on her car and put its paws and nose inside the car to better illicit incriminating information. The trial court made two fundamental

errors. The court ignored the only testimony regarding the dog's trespass, and video evidence that confirmed that the dog entered the vehicle. Legally, the court applied the wrong test to determine whether state action is a search. However, under any test the officer violated Harrell's Fourth Amendment rights. The Government has attempted to salvage the ruling with supplemental authority. That authority is distinguishable, and also applies the wrong test because it predates controlling Supreme Court cases.

I. The canine unit physically intruded into Harrell's vehicle.

Video evidence establishes that the police dog placed its paws on the door and extended its nose into the passenger compartment of Harrell's vehicle. The only testimony on the issue confirms this. Nonetheless, the trial court incorrectly determined that the dog "placed his paws on the door, but did not extend his nose into the passenger compartment." J.A. at. 205.

This Court reviews a trial judge's factual findings for clear error. *United States v. Rader*, 65 M.J. 30, 32 (C.A.A.F. 2007). Clear error is not an insurmountable standard of review; that would mean no review at all. When a military judge's view of the evidence is impermissible, that is clear error. *United States v. Catano*, 75 M.J. 513 (U.A.F.C.A. 2015). Courts give the greatest deference when a trial judge makes credibility determinations to evaluate witness testimony. *See Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 575 (1985).

The court's factual finding relied on no credibility determinations. Instead, the canine officer's testimony casts doubt on the finding. The officer testified, "I would assume [the dog's] head might have broke the plane of the window, very well could have." J.A. at 124. The trial judge disregarded this testimony, finding that the dog did not enter the passenger compartment based entirely upon video evidence. J.A. at 8. Accordingly, the appellate record contains the only evidence that the trial court used to reject the officer's testimony. The only permissible view of the video evidence is that it shows the dog entering the passenger compartment.

The lighting and focus of the patrol car's dashboard camera clearly show the canine unit's actions. Moreover, the vehicle's angle and the camera's position allow the viewer to see whether the dog entered the passenger compartment:

Figure 1

Figure 1 shows the dog "going high," meaning that it jumped up onto the subject of the sniff. J.A. at 119. The dog's paws are resting on the vehicle's door. The dog's nose has just begun to enter the passenger compartment.

Figure 2

Figure 2 shows the instance the officer described when testifying that the dog "might have had his front paws on the window seal." The paws are higher and more forward in Figure 2 than in Figure 1. The dog's head has extended farther, placing its nose in the passenger compartment. The nose is not entirely visible, not because of the camera angle, but because it is in Harrell's vehicle.

The factual finding was clear error because the court ignored the officer's testimony and made conclusions based solely upon an impermissible description of the video images captured in Figures 1 and 2.

Even if the dog did not enter the passenger compartment, it is undisputed that it jumped up on the side of the vehicle. Figures 1 and 2 make clear that the

dog's paws made contact in several places on the door and the window seal. A dog could easily damage a vehicle by "going high." Indeed, the officer admitted that the police department could be liable for this vehicle damage. R. at 124. Such damage could only occur during a physical intrusion. Both by entering the passenger compartment of the vehicle and by "going high" on the outside of the car, the canine unit here physically intruded on the vehicle.

II. A physical intrusion by a canine unit is a search under the Fourth Amendment.

A dog sniff that physically intrudes into a constitutionally protected space is a search under the Fourth Amendment. The Fourth Amendment specifically protects effects. A vehicle is an effect within the meaning of Fourth Amendment. *United States v. Chadwick*, 433 U.S. 1, 12. (1977). As an effect, a vehicle is a constitutionally-protected area. *United States v. Jones*, 132 S. Ct. 945, 952 (2012).

Two tests determine if a particular action is a search. *See Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013). The first test considers whether a state actor committed a physical trespass. *See Olmstead v. United States*, 277 U.S. 438, 457, (1928). The second is a two-part inquiry into the subjective and objective reasonableness of the defendant's privacy expectation. *Smith v. Maryland*, 442 U.S. 735, 740 (1979) (quoting *Katz v. United States*, 389 U.S. 347, 360-62 (1967) (Harlan, J., concurring). Police action can be a search under either test. *United*

States v. Cowan, 674 F.3d 947, 955 (8th Cir. 2012). The long-standing physical-trespass test is still valid after *Katz*. *See Jones*, 132 S. Ct. at 950.

The Court has analyzed dog sniffs under both the physical-trespass and reasonable expectation of privacy tests. *See, e.g.*, *United States v. Place*, 462 U.S. 696 (1983); *Jardines* 133 S. Ct. at 1409. Although using dogs to sniff for odors of drugs emanating from a constitutionally-protected area is not a search under either test, if the dog trespasses, then the sniff becomes a search.

A. The canine unit searched Harrell's car under the physical-trespass test.

Jones and *Jardines* require the trial court to grant Harrell's suppression motion. *Jones* explains that a search occurs when the government physically trespasses, even in the absence of a reasonable expectation of privacy. *Jardines* then applies the same physical-trespass test to dog sniffs.

Trespassing on a vehicle's exterior to gain information is a search. *See Jones*, 132 S. Ct. at 954. In *Jones* police officers attached a tracking device to the exterior of a suspect's vehicle. That act did not risk damage to the suspect's vehicle. *Jones* specifically ruled that a trespass on the exterior of a vehicle in a public place was a search when it was for the purpose of finding information, and rejected the argument that "[t]he exterior of a car ... is thrust into the public eye, and thus to examine it does not constitute a 'search.'" *Id. at 952.* The Court relied on the common law understanding of trespass in its finding. *Id. at 949.* "[O]ur law

holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave; if he does he is a trespasser, though he does no damage at all; if he will tread upon his neighbour's ground, he must justify it by law." *Id.* (quoting *Entick v. Carrington*, 95 Eng. Rep. 807 (C.P. 1765)). Indeed, *Jones* relied on long standing precedent that even a "momentary" trespass is a search. *Id*. (citing *New York v. Class*, 475 U.S. 106, 114-15 (1986) ("officer's momentary reaching into the interior of a vehicle did constitute a search"). Even a *de minimus* trespass to gather information is a search.

Katz did not limit the physical-trespass test. *Jones, 132 S. Ct.* at 951. "[F]or most of our history the Fourth Amendment was understood to embody a particular concern for government trespass upon the areas ('persons, houses, papers, and effects') it enumerates. *Katz* did not repudiate that understanding." *Id*. *Katz* did not erode the principle "that, when the Government does engage in physical intrusion of a constitutionally protected area in order to obtain information, that intrusion may constitute a violation of the Fourth Amendment." *United States v. Knotts*, 460 U.S. 276, 286 (1983) (Brennan, J., concurring). As a result the Court's holdings that some dog sniffs do not implicate a reasonable privacy interest, *see, e.g.*, *Place*, 462 U.S. at 707, do not apply when a dog physically trespasses.

The Fourth Amendment prohibits a physical trespass by a police dog to obtain information. *See Jardines*, 133 S. Ct. at 1414. In *Jardines*, the police

allowed a drug-detection dog onto the defendant's porch, because they believed the dog to be following an odor. *Id*. at 1413. Once on the porch, the dog indicated at the front door. *Id*. The Court held that police conducted a search because the dog physically trespassed. *Id*. at 1415. The Court determined that the porch was a constitutionally protected area. *Id*. Use of a drug dog made an otherwise permissible incursion a search that violated the Fourth Amendment. *Id.* at 1414.

In this case the dog trespassed on the exterior of Harrell's vehicle. The physical intrusion here is even more clearly a trespass because it contains the possibility of damaging the vehicle and subjecting the police to liability. J.A. at 124. As in *Jones*, the trespass onto the outside of the car was more than casual contact because its purpose was gathering information. The Court's conclusion equally describes the current case, "It is important to be clear about what occurred in this case: The Government physically occupied private property for the purpose of obtaining information." *Jones* at 949. *Jardines* applies the logic that underpinned *Jones* to drug detection dogs. Even if the canine unit went high to follow a scent, that trespass was a search. Here, the canine unit trespassed by occupying the exterior of the car and by entering the passenger compartment.

B. The canine unit searched Harrell's car under the reasonable expectation of privacy test.

A dog sniff that physically intrudes by entering or jumping onto a vehicle is a search under the reasonable expectation of privacy test and falls outside the

limited dog-sniff exception for two reasons. First, the reasoning underpinning the dog-sniff exception does not apply when there is a physical intrusion into a constitutionally protected area. Second, such a physical intrusion on a vehicle violates a person's reasonable expectation of privacy.

1. The rationales for classifying a dog sniff as a non-search do not exist for interior sniffs.

The Supreme Court first addressed whether canine sniffs are searches in a case where an officer used a drug-detection dog to sniff a suspect's luggage in a public place. *See Place*, 462 U.S. at 707. The Court ruled that such a sniff was not a search under the Fourth Amendment based upon two factors. First, "this investigative technique [was] much less intrusive than a typical search*." Id.* The sniff did not require touching the luggage. *Id.* Second the dog sniff was binary. The only information that police could gain was the presence or absence of narcotics, for which there can be no reasonable expectation of privacy. *Id.* Thus the dog sniff was less intrusive and more limited than other search methods. *Id*.

Following *Place,* the Court concluded that dog sniffs of a vehicle's exterior were not searches. *City of Indianapolis v. Edmond*, 531 U.S. 32, 40 (2000)*; Illinois v. Caballes*, 543 U.S. 405, 409 (2005). In *Edmond*, the dog sniffed "the *exterior* of respondent's car." *Edmond*, *531 U.S.* at 40 (emphasis added). Only exterior sniffs are not searches. "The fact that officers walk a narcotics-detection dog *around* the *exterior* of each car . . . does not transform the seizure into a search. Just as in

Place, an *exterior sniff* of an automobile does not require entry into the car . . . ." *Id.* (emphasis added) (citations omitted). That is because "a sniff by a dog that simply walks around a car is 'much less intrusive than a typical search.'" *Id.* (quoting *United States v. Turpin*, 920 F.2d 1377, 1385 (8th Cir. 1990)).

Physically intrusive dog sniffs are searches because they violate a person's reasonable expectation of privacy. They unreasonably subject persons to government intrusion, and thus, violate the Fourth Amendment under *Katz*.

2. A physical intrusion on a vehicle violates a person's reasonable expectation of privacy.

There is a constitutionally protected privacy interest in vehicles. *Arizona v. Gant*, 556 U.S. 332, 345 (2009). A person's expectation of privacy differs based on the sort of intrusion to which they are subjected. *See Bond v. United States*, 529 U.S. 334, 338-39 (2000).

An inspection becomes a search when it is physically invasive. *See Id.* at 337. In *Bond* a police officer physically inspected a bus passenger's luggage, without opening it. The Court held that this violated the Fourth Amendment, even when no damage was done and the search only touched the exterior. *Id*. at 338. The Court reasoned that the passenger expected that his bag might be handled, but did not expect that others would touch the bag in an exploratory manner. *Id*. at 338-39.

Police engage in a search when they use detection devices. *See Kyllo v. United States*, 533 U.S. 27 (2011). In *Kyllo*, police used a thermal imaging device

to detect heat emanating from the suspect's home. The heat suggested that the suspect was growing marijuana. The court found that using the device was a search because the officers obtained information that without the device could only have been obtained by physical intrusion into a constitutionally protected area. *Id.* at 34.

In this case the police conducted a physically-intrusive inspection using a detection device, the drug dog. The physical interaction here is similar to the physical interaction with the defendant's effects in *Bond*. While a dog sniff that does not touch a person's effects is not a search under the limited dog-sniff exception, one that does, falls under the reasoning in *Bond* and violates a person's reasonable expectation of privacy. Moreover, the intrusion by the dog here is analogous to the use of the detection device in *Kyllo*. If the officers had swabbed the outside of the vehicle for evidence of contraband or placed a drug-detecting device in the open window then that would be a search. The expectation of privacy is no different when a canine unit intrudes in the same way. Because the canine unit here physically intruded—unlike in *Place*, *Edmond* and *Caballes*—the officers violated the suspect's legitimate expectation of privacy.

III. Instinctual actions do not prevent otherwise intrusive dog sniffs from being searches, but if they do, here the dog did not act on instinct.

Although some circuits concluded that a canine could physically trespass on a vehicle without searching, those cases were decided before, or failed to consider, *Jones* and *Jardines*. *See United States v. Sharp*, 689 F.3d 616 (6th Cir. 2012)

(Canine's sniff inside of the car is not a search as long as the police did not encourage the entry.); *United States v. Lyons*, 486 F.3d 367 (8th Cir. 2007) (same); *United States v. Pierce*, 622 F.3d 209 (3rd Cir. 2002) (same); *United States v. Winningham*, 140 F.3d 1328 (10th Cir. 1998) (same); *United States v. Stone*, 866 F.2d 359 (10th Cir. 1989) (same). These cases held that there was no search where a dog instinctively jumped into a vehicle. *Id*. The Government's contention—that any physical intrusion by a canine is permissible as long as it is not encouraged by the officer—rests entirely upon these outdated cases. App'ee Brief at 24-5.

These cases do not apply. First, *Jones* and *Jardines* show that even when a dog is following a scent into a constitutionally protected area the canine unit effectuates a search. Second, a test based on the dog's instinct is unworkable. Finally, in this case jumping onto the car was not against the dog's training; therefore this action was not instinctive.

A. Under *Jones* and *Jardines*, a Fourth Amendment violation occurs when a dog trespasses into a constitutionally protected place.

None of the cases Appellee cites evaluate the canine unit's actions under *Jones* and *Jardines*. Indeed, all the cited cases, except *Sharp*, were decided before *Jones*, and none were decided after *Jardines*. The Court held that the fact "that the officers learned what they learned only by physically intruding on [the defendant's] property to gather evidence is enough to establish that a search

occurred." *Jardines*, 133 S. Ct. at 1417. This reasoning is equally applicable here. Because the courts failed to use the physical-trespass test they are unpersuasive.

B. A rule that does not classify physically-intrusive dog sniffs as searches drastically limits Fourth Amendment protections.

The test suggested by Appellee and the cases it cites is unusable because it requires an inquiry into the subjective intent of a dog. It is impossible to inquire on a case-by-case basis as to the dog's instinct, and whether dog was acting on it in entering a vehicle. The test should evaluate the canine unit's physical actions, and the line for a dog sniff becoming a search is a physical intrusion. A physical-intrusion test is not only easier for courts and law enforcement; it also fits more squarely into the long standing Fourth Amendment jurisprudence.

Under Appellee's proposed rule police could allow a dog to jump into a bed of a truck, a cargo trailer, or an open window of a car. They could do so without probable cause and would have no incentive to prevent a dog from doing so or get a warrant. Indeed, they would be incentivized to use dogs that are more likely to trespass. Such a rule encourages officers to not exercise control over dogs.

C. Going high was not against the police dog's training.

Even if Appellee's cited authority is not outdated, it still supports the conclusion that the canine unit searched Harrell's car. If the correct distinction for an intrusive search is between instinctive and facilitated entry by a dog, this case is one of facilitated entry.

In a lengthy series of questions the officer repeatedly confirmed that going high and into the car was acting in accordance the dog's training. J.A. at 124-25.

> Q. So when the canine jumped up on the car like that, and put his paws in the window, he was making an error, he was disregarding his training?
>
> A. No.

J.A. at 124. The officer testified that the dog is trained "to try to get as close to [the] source as possible." JA. at 125.

A drug-detection dog does not act independently. Rather an officer must work in conjunction with a specific dog and be trained and certified in this way. Here, the dog and officer were trained and certified together. J.A. at 118, 195-200. The actions of the dog cannot be separated from those of the handler. As one court described, the dog is an "extension of the officers' sensory faculties." *United States v. Thomas*, 787 F. Supp. 663, 684 (E.D. Tex. 1992).

Conclusion

The United States Air Force Court of Criminal Appeals should be overturned because it failed to find that the canine unit's physical intrusion onto Appellant's effects was a search under the Fourth Amendment.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and transmitted by electronic means with the consent of the counsel being served to:

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COMPLIANCE WITH RULE 24(d)

This brief complies with the type-volume limitations of Rule 24(c) because:

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